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No. 94-843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—v.—

PFIZER INC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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20 pp

QUESTION PRESENTED

Whether petitioners, as unnamed, nonintervening class members, have standing to appeal a district court's order denying their Fed.R.Civ.P. 60(b) motion to reconsider approval of a class settlement, when through previous appeal a final determination has been made that the unnamed, nonintervening class members lacked standing to appeal from the underlying judgment approving the class settlement.

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondents, Plaintiffs' Class Bowling, et al., oppose the Petition for a Writ of Certiorari.[1]

The Petition raises issues identical to those raised in petitioner's previous petition for certiorari in this case (No. 93-1912), which petition was denied by this Court on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S.Ct. 294 (1994). Further, the Court of Appeals for the Sixth Circuit has dismissed petitioners' appeal upon the basis of established principles of appellate standing as set forth by this Court, and applied by the Courts of Appeals. Additionally, the facts of the instant

[1] Respondents have no Rule 29.1 parent companies or subsidiaries.

case are so particular to this matter that this case is not suitable for review by the Supreme Court

ADDITIONAL OPINION BELOW

The decision of the district court approving the class settlement is reported at 143 F.R.D. 141 (S.D.Ohio 1992).

STATEMENT OF THE CASE

Bowling, et al. v. Pfizer Inc, et al., the litigation from which the instant petition arises, is a product liability class action which was brought on April 19, 1991 by living recipients implanted with the Bjork-Shiley Convexo/Concave Heart Valve and their spouses. The Convexo/Concave Heart Valve was manufactured by defendant Shiley Incorporated, a wholly-owned subsidiary of defendant Pfizer Inc. Plaintiffs' class alleges that the Convexo/Concave Heart Valve is inherently defective in that the product has a propensity to fracture. Plaintiffs' class includes approximately fifty thousand (50,000) valve recipients residing world-wide.

Petitioners are neither named parties nor intervenors to the *Bowling* litigation, but merely two valve recipients and one spouse who are class members. Petitioners filed a state court class action, *Taylor v. Shiley*, in February 1986, on behalf of Convexo/Concave Heart Valve recipients residing in Pennsylvania, only, with large (but not small) valves, who did not have pending lawsuits. (R. 143, Ex. D: Second Amended Complaint In *Taylor v. Shiley*, at p. 34).[2] In September, 1989, more than three years after initial filing of their Pennsylvania lawsuit, plaintiffs first moved for class certification. Their motion for certification has been pending before the state court for more than five years. No class has been certified in the state court action. Neither have class counsel been

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[2] Citations to the record are to the district court docket numbers.

appointed in the action, nor has any communication with members of that putative class ever been undertaken or ordered by the state court. No class settlement has been negotiated in *Taylor v. Shiley*. Petitioners allege that they were well situated to obtain a sizable recovery upon the behalf of the putative Pennsylvania class. This allegation is false and was determined to be "specious" by the district court. *Bowling v. Pfizer*, 143 F.R.D. 141, 161 (S.D.Ohio 1992). Precedential case law negates the viability of any cause of action by petitioners under Pennsylvania law. *Brinkman v. Shiley Inc.*, 732 F.Supp, 33 (M.D.Pa. 1989), *aff'd* 902 F.2d 1558 (3rd Cir. 1989); *Angus v. Shiley, Inc.*, 989 F.2d 142 (3rd Cir. 1993).

On January 23, 1992, the *Bowling* case was conditionally certified as a Rule 23(b)(3) opt-out class action by the district court. (R. 48: Order Certifying The Conditional Settlement Class And Scheduling A Fairness Hearing).

In January, 1992, class counsel and counsel for defendants entered into a proposed settlement agreement. Subsequent to the issuance of appropriate notice to the class, the proposed settlement agreement was the subject of fairness hearings before the district court on June 5, 8, 9, 1992 and July 22, 1992. In accordance with the notice provided the class, any class member who wished to participate during the hearings was permitted to do so. The Court also permitted non-class members claiming an interest in the outcome to participate, including the representatives of consumer groups. As indicated by the transcripts of proceedings (R. 202: Transcript Of Fairness Hearing; R. 207: Transcript Of Fairness Hearing; R. 208: Transcript Of Fairness Hearing; R. 224: Transcript Of Fairness Hearing; and R 251: Transcript Of Fairness Hearing), the district court heard from more than forty different American and foreign counsel and individuals, as well as considering written communications to the Court by class members who could not be present. A multitude of individuals participated vigorously in the process. No person who desired to be heard was refused.

By electing to opt-out, class members did *not* waive their opportunity to be heard or to object to the proposed class settlement. Petitioners' assertion to the contrary is untrue. *Bowling*, 143 F.R.D at 155-56. During a May 19, 1992 status conference, prior to the fairness hearings and prior to the date petitioners were to elect whether to opt-out, all attendees, including petitioners, were specifically informed of this by the district court. (R. 122: Civil Minutes at p. 28).

Petitioners received class notice of the *Bowling* settlement in February, 1992, and the complete text of the proposed agreement was available for their inspection. On February 26, 1992, less than one month after the proposed settlement had been reached, petitioners provided the state court with a status report wherein petitioners advised the state court of the *Bowling* proposed settlement and indicated that petitioners were meeting with defendants regarding the terms of the settlement. (R. 255: Second Supplemental Memorandum By Defendants In Support Of Settlement, Ex. 1). Moreover, the district court granted petitioners' request for written discovery of the terms of the settlement from class counsel and defendants prior to the fairness hearings.

Petitioners were given three opportunities to opt-out of the *Bowling* settlement. Yet, petitioners each time affirmatively elected to remain within the *Bowling* settlement class. (R. 224: June 9, 1992, Transcript of Proceedings, at pps. 92-95; R. 251: July 22, 1992, Transcript of Proceedings, at p. 83).

On August 19, 1992, the District Court issued a sixty-eight page Order Finding The Proposed Settlement To Be Fair. *Bowling*, 143 F.R.D. 141. On September 10, 1992, the District Court entered its Judgment Certifying The Settlement Class And Approving The Class Settlement. (R. 255).

On September 17, 1992, petitioners filed their notice of appeal to the Court of Appeals for the Sixth Circuit. (R. 258). Petitioners were the only class members to appeal the district court's rulings. Petitioners did not seek to intervene prior to

filing a notice of appeal.[3] Petitioners' assertion that the district court gave every indication that intervention was *not* required is unjustifiable and unfounded.

On September 25, 1992, petitioners filed a belated motion to intervene in the district court, despite the fact that the filing of the notice of appeal had already divested the district court of jurisdiction. By memorandum decision dated November 9, 1992, the district court determined that it would not decide the motion to intervene. Petitioners appealed from the district court's memorandum decision also.

On March 2, 1993, while petitioners' appeal was pending, petitioners' filed a motion under Fed.R.Civ.P. 60(b) requesting the district court reconsider its approval of the class settlement. (R. 315). By Order dated March 26, 1993, the district court concluded there was no basis to request a remand from the Court of Appeals for a multitude of reasons including that some of the matters raised in the motion were already considered by the court in approving the settlement; many of the allegedly "newly discovered" matters were actually known by petitioners, or with reasonable diligence could have been dis-

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[3] The position taken by petitioners in their appeal is completely contrary to that taken by their counsel in a hearing before state court Judge Lord in *Taylor v. Shiley* on December 29, 1992. Exhibit C-1 to the transcript of that hearing (R. 334) indicates that petitioners' counsel applauded the *Bowling* settlement from the standpoint of his three clients:

> [A]lthough our clients were offered the opportunity to opt [out] of the *Bowling* case, they elected to stay in the case and obtain the benefits of the *Bowling* settlement . . . One of our clients has been identified as a candidate for a re-operation, which means that her Pfizer heart valve would be removed and a new heart valve implanted. Under the *Bowling* settlement, this client could expect to receive substantial compensation and to thus be able to afford the procedure. Accordingly, the prospect of waiting many, many years for a resolution of the *Taylor* case, compared to the relief provided by a prompt implementation of the *Bowling* settlement was something that the client considered. The other client who has a working heart valve is also in a fragile state of health.

covered at the time of the fairness hearing, or were actually discussed at the fairness hearing; much of the "newly discovered evidence" consisted of newspaper articles; and when the court held its fairness hearing, it was well aware that some plaintiffs' counsel had accused the defendants of "fraud" with respect to the causes of action underlying the case, and it took this accusation into account when it approved the settlement. (R. 335). Petitioners appealed. (R. 337). On June 9, 1993, the Sixth Circuit dismissed the appeal because the district court's order declining to request a remand from the Court of Appeals was not an appealable order.

On December 21, 1993, the Sixth Circuit issued two Orders. The first Order affirmed the district court's determination that it lacked jurisdiction to rule on the motion to intervene while petitioners' appeal was pending. (Pet. App. at 10a).

The second Order dismissed the principal appeal. Citing to *Guthrie v. Evans,* 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco,* 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied,* 113 S.Ct. 1251 (1993), and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988), the Court of Appeals held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 7a). Petitioners then petitioned for rehearing *en banc*, relying upon *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942) and an alleged inconsistency between *Cohen* and the more recent unpublished decisions of the Sixth Circuit. Respondents were asked to file a response, addressing these specific allegations, and did so.

On March 4, 1994, the Court of Appeals denied the petition for rehearing *en banc,* noting that the petition had been circulated among all active judges of the Sixth Circuit, and that "no judge . . . requested a vote on the suggestion for rehearing en banc." The Court further stated that the original hear-

ing panel had "further reviewed the petition for rehearing and [had] conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." (Pet App. at 8a). Petitioners then filed a Petition for Writ of Certiorari, No. 93-1912, with the Supreme Court of the United States, presenting the question of whether unnamed, nonintervening class members have standing to appeal from a judgment approving a class settlement. The petition was denied on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S.Ct. 294 (1994). Upon denial of the petition, the judgment approving the class settlement became final, and the district court instituted implementation of the settlement agreement.

Prior to the filing of the aforementioned petition and during the time period the district court regained jurisdiction, the district court ruled upon petitioners' pending motions. On April 5, 1994, the court denied petitioners' motion to intervene "because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class." (Pet. App. at 6a). Petitioners did not appeal from the order denying intervention. Instead, on April 13, 1994, they filed a motion in the district court under Fed.R.Civ.P. 59(e) for reconsideration of the denial of their motion to intervene. (R. 371).

On April 12, 1994, the district court denied petitioners' Rule 60(b) motion stating, "This complex and far-reaching settlement agreement was approved after exhaustive consideration and after the Court conducted fairness hearings on June 5, 8 and 9, 1992 and July 22, 1992. We have now thoroughly reconsidered our decision approving this settlement and conclude that after careful review of the Objectors' motion, and further review of our 68 page Order approving the settlement, we hereby conclude that the interest of justice dictates that the Objectors' motion be, and is hereby, denied." (Pet. App. at 5a). On May 3, 1994, petitioners filed a notice

of appeal from that decision. On August 8, 1994, the Sixth Circuit dismissed the petitioners' appeal upon the basis that petitioners were nonparty class members who were denied intervenor status, who were already found by the Court of Appeals to lack standing to appeal the settlement, and who likewise lacked standing to appeal the denial of their Rule 60(b) motion whereby they sought once again "to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge". (Pet. App. at 1a, 2a). The instant petition stems from this determination of the Court of Appeals for the Sixth Circuit.

SUMMARY OF REASONS FOR DENYING THE WRIT

A substantially identical petition, filed by the instant petitioners, was denied by this Court on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S.Ct, 294 (1994), Petitioners have already been found to be nonparty, nonintervening class members who lack standing to appeal.

The primary question presented by the petition was resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).

The facts underlying this petition are so unusual and particular to this matter that the case is not suitable for review by the Supreme Court, to wit: the nonparty, nonintervening petitioners are the sole class members seeking to overturn a class settlement, which is now final and being implemented; it has already been determined, with finality, that petitioners lack standing to appeal; the settlement petitioners seek to overturn is one in which petitioners affirmatively elected to participate after being given three opportunities to opt-out; and petitioners have their own separate lawsuit (*Taylor v. Shiley*) pending against defendants in a Pennsylvania state court.

Petitioners' argument that dismissal of their appeal violated their constitutional right to due process is meritless, and is based upon a misinterpretation of 28 U.S.C. Section 1291.

REASONS FOR DENYING THE WRIT

1. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED ESTABLISHED PRINCIPLES OF APPELLATE PROCEDURE ESTABLISHED BY THIS COURT AND CONSISTENTLY APPLIED BY THE COURTS OF APPEAL.

The question presented for a second time by petitioners has already been resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).[4] Therein, the Court specifically and conclusively held that only individuals who are parties, or those who properly become parties, may appeal an adverse judgment. Citing to *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) (appeal from denial of class action certification), this Court also rejected the suggestion made by the Second Circuit that there could be exceptions to this rule, finding instead that a nonparty is to seek intervention for purposes of appeal.

Subsequent to *Marino*, every Court of Appeals presented with an appeal from a class action judgment brought by nonparty class members has ruled that such do not have standing to appeal. *Shults v. Champion International Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v Alleco*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

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[4] The petition for writ of certiorari is in large measure a verbatim restatement or petitioners' previous certiorari petition (No. 93-1912), which this Court denied.

Petitioners' argument that there is a "split" among the circuits as to the issue of a nonparty class member's standing to appeal a judgment approving a class settlement is unfounded. No Court of Appeals presented with this issue has declined to follow the holding of *Marino*.

Petitioners rely primarily upon decisions rendered prior to *Marino*. While petitioners cite to three cases decided after *Marino*, none stand for the proposition asserted by petitioners. In *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), a nonparty class member was found not to have standing to appeal a post-settlement order implementing a settlement agreement. In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993), nonparty class members appealed from a denial of their motion to intervene. The appeal was dismissed by the Third Circuit upon the basis that the appeal was interlocutory in nature and not immediately appealable. Thus, the factual and procedural circumstances present in *Carlough* were far different than those of the instant petition wherein petitioners neglected to intervene prior to appealing a final judgment approving a class settlement. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993) was a shareholders' derivative suit, not a class action, and therefore "inapposite". *Gottlieb*, 11 F.3d at 1010-11 (10th Cir. 1993). Indeed, *Bell Atlantic* itself stated that "one of the rationales offered in support of an intervention requirement cannot apply to derivative actions" because "unlike members of a class certified under Rule 23(b)(3), 'shareholders normally cannot opt out of the class and pursue their own individual action.' " *Bell Atlantic*, 2 F.3d at 1308 n.4 (citation omitted).

The supposed "split" among the circuits, argued by petitioners, is nonexistent. *Gottlieb*, 11 F.3d at 1009. Subsequent to this Court's decision in *Marino*, the Courts of Appeal have uniformly held that non-party class members do not have standing to appeal from a judgment in a class action absent a grant of intervention.

The decision below is supported by the language and underlying policies of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In *Marino*, this Court relied upon the text of the Federal Rules of Appellate Procedure in holding that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." 484 U.S. at 304. As the Court stated, Fed.R.App.P. 3(c) specifically requires that the notice of appeal specify the "party or parties" taking the appeal. *Id.*

The Sixth Circuit's decision, from which certiorari is sought, is also supported by the language of the class action and intervention provisions of the Federal Rules of Civil Procedure. Unnamed individual class members cannot represent the class absent the procedures provided for in Fed.R.Civ.P. 23, for neither plaintiffs nor counsel can represent a class absent a district court's finding on issues such as adequacy of representation. Second, class members who disagree with the course of a class action have adequate procedures available to them, such as collateral attack, through which they can protect their interests. Procedures applicable include intervention and the right to opt-out of a case designated as a Rule 23(b)(3) class action.[5] Third, class actions would become unmanageable and non-productive if each member could individually decide to appeal, thereby defeating the very purpose of class action lawsuits. *See, Croyden*, 969 F.2d 675; *Walker*, 858 F.2d 1071; *Guthrie*, 815 F.2d 626.

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[5] The "opportunity to opt-out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members." *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977). Class members are in an advantageous position because "they [know] the terms of the settlement before having to decide whether to opt out." *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 175 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (in making an opt-out decision, settlement class members "can benefit from the specific knowledge of the amount of recovery they can expect from remaining in the class".).

In addition to the foregoing, it must be pointed out that petitioners did not have standing to file their initial Rule 60(b) motion with the district court, which was predicated specifically on subsections (2), (3) and (6) thereof. Petitioners did *not* assert reliance upon that separate provision of Rule 60(b) which permits a judgment to be set aside for "fraud upon the Court". *Broyhill Furniture v. Craftsmaster Furniture*, 12 F.3d 1080, 1085 (Fed.Cir. 1993). It is clear that the relief requested by petitioners may only be sought by, and granted to, "a party or a party's legal representative". *See, In re Lovitt*, 757 F.2d 1035, 1040 (9th Cir, 1985), *cert. denied*, 106 S.Ct. 145 (1985); *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834, 844 (10th Cir. 1974). Cases cited by petitioners do not support a holding to the contrary. Furthermore, lack of standing constitutes a lack of jurisdiction. *Bender v Williamsport Area School Dist.*, 106 S.Ct. 1326, 1327 (1986).

II. THE UNIQUE AND UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT.

The petition is unsuitable for review by this Court, due to the unique and unusual facts of this case, to wit: it has already been determined, with finality, that petitioners lack standing to appeal; petitioners seek to overturn a class settlement which they affirmatively elected to join after being given three opportunities to opt-out; petitioners had, and still have, their own separate lawsuit against defendants (*Taylor*) pending in the Pennsylvania state court; petitioners seek to overturn a class settlement which petitioners characterized to the Pennsylvania state court as one which provided petitioners with substantial, necessary, needed benefits and compensation; petitioners are the only class members seeking to overturn a class settlement which was acceptable to class representatives and all other members of the class; and peti-

tioners seek to overturn a class settlement which is now final and being implemented.

III. PETITIONERS' "DUE PROCESS" ARGUMENT IS MERITLESS.

Petitioners argue that dismissal of their appeal violated their constitutional right to due process of law. Relying upon 28 U.S.C. Section 1291, petitioners assert that they have a statutory right to appeal regardless of standing. Petitioners' reliance is misguided, for that statute grants appellate jurisdiction to the courts of appeal, not an absolute right to appeal regardless of standing.

Petitioners also assert that they had a right to rely upon pre-*Marino* rulings of the Court of Appeals for the Sixth Circuit on the issue of standing to appeal.[6] But petitioners' interpretation of those cases was rejected by the Sixth Circuit in *Shults*.

Petitioners state that the district court led them to believe that intervention was unnecessary and that the district court treated them as *de facto* intervenors. There is no support for such an argument. Petitioners were treated as objecting class members, and nothing more. Moreover, petitioners were treated in the exact manner as the district court treated objecting non-class members, and any other interested individuals or entities, who were permitted to fully participate in the fairness hearing process. The district court never indicated that it considered petitioners to be intervenors, or parties. Assertions to the contrary are simply untrue.

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[6] *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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